No. 80-1024

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

HUEY P. NEWTON,
Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether, in violation of Fourteenth Amendment Due Process, the State has punished the very conduct it has induced by affirmative acts reasnably relied upon by the accused.

II. Whether the federal constitution demands expansion of the collateral estoppel doctrine followed by the state courts.

III. Whether petitioner's conviction rests upon the impermissible retroactive application of Faretta v. California, 422 U.S. 806 (1975) and Lewis v. United States, 100 S.Ct. 915 (1980).

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The unpublished opinion of the Court of Appeal of the State of California, First Appellate District, Division Three, filed on July 28, 1980, is Appendix C to the Petition for Writ of Certiorari.

On August 27, 1980, the Court of Appeal denied petitioner's application for a rehearing.

On October 22, 1980, the California Supreme Court denied petitioner's application for a hearing without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3).

STATUTES INVOLVED

United States Constitution, Article I, section 10 (Ex Post Facto Clause);

United States Constitution, Amendment Fourteen;

California Penal Code section 12021.

STATEMENT OF THE CASE

The District Attorney of Alameda County accused petitioner Huey P. Newton of assault with a deadly weapon and by means of force likely to produce great bodily injury and of two counts of possession of a concealable firearm by one previously convicted of a felony (CT 222-224, 527). A prior

felony conviction for assault with a deadly weapon was alleged (CT 224-225).

Before trial petitioner moved to strike the prior conviction from the accusatory pleading as constitutionally invalid (CT 458-459; 482-508). After a hearing the motion was denied, the trial court declaring "I find that the defendant effectively and knowingly waived his right to an attorney." (Aug. 16, 1978 RT 27).

On the afternoon of August 16, 1974, Preston Callins, a tailor, was found on the sidewalk outside an Oakland apartment (RT 106-107, 111-112). He had suffered six depressed skull fractures and about a dozen lacerations (RT 116-119). Callins was discovered by a neighbor who "couldn't tell who it was, he was so badly beaten up." (RT 107).

The police were summoned. Callins told the responding officer that he had gone

to petitioner's apartment for tailoring and angered petitioner, whereupon petitioner had beaten him on the head with a pistol (RT 182-183, 185).

The victim's fingerprints were found in petitioner's penthouse apartment (RT 200, 243, 256, 282-285, 288-292), as were several carpet blood stains consistent with Callins' blood type, A (RT 120, 237-239, 249-250, 301-302).

A warrant search of petitioner's apartment disclosed two pistols, a loaded .45 caliber semi-automatic found in a kitchen drawer (RT 213, 232), and a loaded .357 magnum revolver found in a drawer in the master bedroom bath (RT 231). The revolver bore traces of type A human blood and of hair (RT 211, 299). The wooden grips of the revolver appeared broken; matching wood chips were discovered on petitioner's carpet (RT 207, 211-212, 229). Fifty-one .357 rounds,

twenty-one .38 rounds, and six shotgun shells were found on the bedroom nightstand (RT 233).

It was stipulated that "on or about the 8th day of October, 1964 in the Superior Court of California, in and for the County of Alameda, the defendant Huey Percy Newton was convicted of a felony." (RT 838).

At trial, victim Preston Callins claimed his Fifth Amendment privilege against self-incrimination, was granted immunity, but persisted in his refusal to testify although jailed for contempt during petitioner's trial (RT 324-338, 341-361, 855).

A jury found petitioner guilty of two counts of possession of a concealable firearm by a person previously convicted of a felony but not guilty of the charged assault (CT 649-653).

Thereafter, the trial court concluded that petitioner was ineligible for probation

as a matter of law (RT 1246-1247), and sentenced him to state prison for two years (CT 923). On appeal, the State conceded that petitioner was eligible for probation. The Court of Appeal agreed and remanded the case to the trial court for resentencing. Petition, 11a-12a.

ARGUMENT

I

PETITIONER'S CONVICTION IS CONSISTENT WITH FOURTEENTH AMENDMENT DUE PROCESS.

Shuttling between procedural and substantive due process, petitioner insists that his conviction offends the Fourteenth Amendment because it was "obtained with no notice to him that his conduct was proscribed, affirmative acts by the State to lead him to believe that his conduct would be permitted, and finally with no requirement of proof of intent despite California's requirement of such." Petition, 8.

Recognizing that "this Court has never articulated a general constitutional doctrine of mens rea," Powell v. Texas, 392 U.S. 514, 535 (1968) (plurality opinion), petitioner maintains that although "it has been specifically held that [California Penal Code] § 12021 requires proof of wrongful intent," he was convicted "without proof of any knowledge or wrongful intent." Petition, 7-8. His argument says the same thing three different ways; it is premised upon a misapprehension of federal and state law.

Federal cases interpreting 18 U.S.C. App. § 1202(a) establish that possession of firearms generally may be punished without regard to mens rea. "[W]hen a statute prohibits possession, mens rea or scienter is not necessary." United States v. Crow, 439 F.2d 1193, 1195 (9th Cir. 1971), vacated on other grounds, 404 U.S. 1009 (1972). Accord, United States v. Quiroz, 449 F.2d 583, 585

(7th Cir. 1975). Cf. United States v. Freed, 401 U.S. 601, 607-610 (1971). "It has been consistently held that, while a felon must knowingly possess the gun to be convicted, he need not be aware that such possession is illegal [Citations], nor even be aware he is a felon . . . ." United States v. Sneed, 353 F.Supp. 280, 284 (D.Md. 1973). From these decisions we infer that a state may, constitutionally, penalize possession of concealable firearms by convicted felons without proving unlawful intent. Broadly speaking, California does so: "'The only knowledge required is knowledge of the character of the object possessed; knowledge that the possession is illegal is unnecessary.'" People v. Howard, 63 Cal.App.3d 249, 256, 133 Cal.Rptr. 689, 693 (1976).

However, petitioner claims that he was denied the benefit of an earlier decision, People v. Bray, 52 Cal.App.3d 494, 124

Cal.Rptr. 913 (1975), which demands proof of wrongful intent. Petition, 8. He does not claim invidious discrimination in the application of state law. On the contrary, he urged the California Supreme Court to grant his petition for hearing because another court in another case had committed the same state law error.[1/] Good faith misapplication of state law does not, at course, state a Fourteenth Amendment claim. Beck v. Washington, 369 U.S. 541, 554-555 (1962).

The basis of petitioner's mens rea argument is his misunderstanding of the scope of Bray. While section 12021 does not so nearly impose strict liability as does

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1. "However, the fact that the [People v.] Jesse [159 Cal.Rptr. 654 (1979)] court and the Court of Appeal in this case pursued an identical approach within a short period of time with reference to the same problem indicates that the issue is a recurring one productive of great confusion and in need of resolution by this Court." Petition for Hearing, 9.

federal law, Bray does not go nearly so far in recognizing lack of knowledge as an affirmative defense as petitioner would have this Court believe. In Bray the defendant previously had been convicted in Kansas for a crime the California prosecutor was uncertain constituted a felony. Thereafter, upon full disclosure of the circumstances of the Kansas conviction, Bray was registered by the Bureau of Collection and Investigative Services as a guard or patrolman and permitted to purchase a gun. In short, the State told Bray he could do the very act later prosecuted: possess a gun. Cf. Cox v. Louisiana, 379 U.S. 595, 571 (1964); Raley v. Ohio, 360 U.S. 423, 438 (1959). In permitting Bray to assert a mistake of fact defense, the court narrowly confined its holding:

> "This decision should not be interpreted to mean instructions on

mistake or ignorance of fact and knowledge of the facts are required every time a defendant claims he did not know he was a felon. Here Bray had been convicted in Kansas of what for California is an unusual crime, 'accessory after the fact' and even the prosecutor claimed difficulty in knowing whether it was a felony. In addition, Bray on more than one occasion had been led to believe by state regulatory agencies he was not a felon: he was allowed to vote, he was registered in an occupation allowing him to carry a gun, and he was allowed to buy and register the gun. Throughout the trial. Bray laid the proper foundation for the instructions and he requested them. It is only in very unusual circumstances such as these that the

giving of these instructions is necessary." 52 Cal.App.3d at 499; 124 Cal.Rptr. at 917.

As did the court reviewing appellant's conviction, other California courts have perceived the narrow limits of Bray. People v. Howard, supra; People v. Norton, 80 Cal.App.3d Supp. 14, 146 Cal.Rptr. 343 (1978). Under California cases the ignorance of fact or law defense, which introduces the element of wrongful intent, is available only when the defendant shows justifiable reliance upon the acts of the State. See People v. Norton, 80 Cal.App.3d Supp. at 24; 146 Cal.Rptr. at 349.

A state may not punish the very conduct which it has induced by its affirmative acts, reasonably relied upon by the accused. See Kratz v. Kratz, 477 F.Supp. 463 (E.D.Pa. 1979) and cases collected therin. Petitioner

points to several state actions which he urges justified his belief that he was no longer a convicted felon and, therefore, was permitted to possess concealable weapons. Given the reasoning of the appellate court below, we consider each such affirmative action. It is appropriate to note, however, that petitioner presented the bulk of these matters not as a defense but in mitigation of sentence. The trial court - mistakenly - would have permitted the defense.[2/]

Petitioner claims justifiable reliance upon two judicial orders striking his prior conviction from indictments. The

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2. At sentencing the trial judge declared:

> "I can't allow it, because, as you know, that was a defense. He could have said Judge Cook told me that that had been set aside . . . . I noticed during the course of trial that Mr. Garry was in the courtroom. I thought he was going to talk about that. But he was not called as a witness." RT 1226. See also RT 1227.

first occurred in 1971, following two previous orders refusing to strike the prior from the same murder indictment. On its face, Judge Cook's 1971 order striking the prior does no more than excise it from an accusatory pleading.

The order declared:

> "defendant may have waived his right to counsel at that time time without an intelligent conception of the consequences of his act."
>
> * * *
>
> "For this reason the charge of prior conviction must be stricken from the indictment."

California law had long held, as it does today, that "a court order finding a prior conviction to be constitutionally invalid and striking the alleged prior conviction from the accusatory pleading in a

pending criminal proceeding does not have the effect of wiping out the prior judgment of conviction . . ." Gonzales v. Municipal Court, 32 Cal.App.3d 706, 711, 108 Cal.Rptr. 612 (1973). Accord, People v. Coyle, 88 Cal.App.2d 967, 973-974, 700 P.2d 546, 551 (1948), quoted in People v. Burke, 47 Cal.2d 45, 51, 301 P.2d 241, 245 (1956).

In 1978, a magistrate dismissed a charge of possession of a firearm by an ex-felon, brought against petitioner. The magistrate erroneously believed himself bound by Judge Cook's 1971 order. Petition, 4. Apart from the fact that the magistrate lacked jurisdiction to act, as a matter of state law, People v. Peters, 21 Cal.3d 749, 581 P.2d 651 (1978); People v. Municipal Court (White), 88 Cal.App.3d 206, 151 Cal. Rptr. 861 (1979), this "affirmative state action" occurred some four years after the possession charged in this case.

Attributing to judicial orders significance far beyond that attached by state law is neither reasonable nor justifiable reliance. That petitioner may have been misinformed by his attorney, Charles Garry, about his right to possess weapons, does not alter the situation. It is hornbook law in California that

> "The defense of action taken in good faith, in reliance upon the advice of a reputable attorney that it was lawful, has long been rejected. The theory is that this would place the advice of counsel above the law, and would also place a premium on counsel's ignorance or indifference to the law." Witkin, 1 California Crimes, 143-144 (1963 ed.).

For due process purposes, it is important to note that the rigor of this rule is relaxed by the availability of two remedies, motion to vacate and writ of habeas corpus, by which

petitioner could have attacked the validity and continued existence of his prior conviction. Petitioner's statement that he "could not have known, even after exercising the utmost care," of his ex-felon status is simply untrue. Petition, 6.

Petitioner emphasizes that since 1971 the State has permitted him to vote. The action of the voting registrar afforded no basis for the belief that the State no longer regarded petitioner as a convicted felon. For over a century California Constitution, Article II, Section 1 provided ". . . no person convicted of any infamous crime . . . shall ever exercise the privilege of an elector in this State." Until 1966, the disqualifying language "infamous crime" was judicially interpreted to include conviction of any felony. Flood v. Riggs, 80 Cal.App.3d 138, 145, 145 Cal.Rptr. 573, 576 (1978). In Otsuka v. Hite, 64 Cal.2d 596,

414 P.2d 412 (1966), however, under the felt compulsion of the Fourteenth Amendment Equal Protection Clause, the California Supreme Court construed the State constitutional provision as disenfranchising only those convicted of "crimes involving moral corruption and dishonesty . . . [constituting] a threat to the integrity of the elective process." 64 Cal.2d at 599; 414 P.2d at 414. Assault with a deadly weapon, petitioner's prior offense, hardly fell within that category. In March, 1973, our state high court re-examined its Otsuka interpretation of the constitutional provision (substantially re-enacted as Article II, section 3), in light of evolving federal equal protection principles, and invalidated the suffrage bar as to former felons. Ramirez v. Brown, 9 Cal.3d 199, 597 P.2d 1345 (1973). In June, 1974, this court reversed that decision. Richardson v. Ramirez, 418 U.S. 24 (1974). The California

Supreme Court found this court's remand moot in light of an intervening amendment of the state charter, Ramirez v. Brown, 12 Cal.3d 912, 528 P.2d 378 (1974), which now provides in Article II, section 4:

> "The Legislature shall prohibit improper practices that affect elections and shall provide for the disqualification of electors while mentally incompetent or imprisoned or on parole for conviction of a felony."

Ex-felons are enfranchised in California.

Petitioner confuses ballots and bullets; the voting registrar did not tell petitioner he could carry a gun or even that he no longer was an ex-felon, but merely that a conviction for assault with a deadly weapon did not threaten the integrity of the elective process.

Petitioner alludes to the decision of the Superintendent at the California

Medical Facility at Vacaville to permit him to visit an inmate. Since both the applicable state statute (California Penal Code section 4571) and the then-effective prison administration regulation (Director's Policy 2705) permitted ex-felons to visit at the discretion of the warden or superintendent, the superintendent's determination did not reflect upon petitioner's status as a convicted felon.

Finally, petitioner complains that he could have been, but was not, charged with violating Penal Code section 12021 in 1972 and in 1974. The record does not disclose the basis on which the prosecutor exercised his discretion in either case. Assuming that the charging deputy district attorney was aware of petitioner's 1964 conviction, it may have been thought that the circumstances of the 1972 offense warranted only a misdemeanor charge, as was alleged. Nor does the record

illuminate the 1974 charging determination which may have involved a tactical decision to avoid encouraging a compromise verdict. The reconsideration of the accusation in the instant case is not attributable to the intervening decision in Faretta v. California, 442 U.S. 806 (1975), but to the change in petitioner's fugitive status. Given the variety of factors influencing prosecutional discretion in charging crimes, a state cannot be constitutionally compelled to choose between immediately condemning conduct or forever condoning it. Finally, it is difficult to regard seriously petitioner's claim of reliance on the omissions of the district attorney. After all, the admitted 1972 possession occurred before the 1972 or 1974 charging decisions.

We find nothing in the actions of the State of California which estop it from penalizing petitioner's present possession.

Nor do we find such estoppel constitutionally compelled. Our view is reinforced by the availability of judicial procedures whereby petitioner could have contested the continued validity of his prior conviction.

II

THE CONTOURS OF CALIFORNIA'S COLLATERAL ESTOPPEL DOCTRINE ARE NOT DICTATED BY THE FEDERAL CONSTITUTION

For the first time petitioner urges that his collateral estoppel theory, rejected as a matter of state law, must be accepted as constitutionally compelled.[3/] At the outset of petitioner's August 16, 1978, hearing on his motion to strike the prior conviction, the trial judge, referring to the 1971 ruling striking the prior, inquired:

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3. An examination of petitioner's Opening Brief (28-33) and Reply Brief (39-53) in the California Court of Appeal and his Petition for Hearing (20-27) in the California Supreme Court, reveals that this argument has only now acquired federal overtones.

"Are you saying that in any way is res judicata in this action?

Defense counsel replied:

"MR. STEEL: I am not saying that there is res judicata applicable to a motion to strike at all. I don't think that it applies to the prosecution or to the defense and I think that Gonzales versus Municipal Court establishes that." August 16, 1978 RT 1-2.

Having lost his trial court challenge to the constitutional validity of the 1964 conviction, on appeal petitioner sought refuge in the collateral estoppel doctrine which, he belatedly claimed, prevented reconsideration of the 1971 order. Petitioner's failure to assert the bar of res judicata in the trial court could have been held a waiver. Dillard v. McKnight, 39 Cal.2d 209, 209 P.2d 387 (1949), Cf. Wainwright v. Sykes,

433 U.S. 72 (1977). Instead, the California Court of Appeal rejected his claim on the merits as a matter of state law. Petition 7a. Cf. Sumner v. Mata, 101 S.Ct. 764, 769 (1981). However, petitioner did not claim in that or any state court that "principles of double jeopardy and due process" Petition, 9, prevented use of his prior conviction as an element of the present offenses. That failure ends inquiry here. Beck v. Washington, 369 U.S. 541, 550 (1962); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

The notion that the federal Constitution requires that states accord res judicata effect to motions to strike prior convictions from specific pleadings is startling. Convicted in 1964 of assault with a deadly weapon, petitioner was tried three times on felony charges under a 1967 indictment. Each time petitioner moved to strike his prior conviction; he failed twice,

succeeding only in his last attempt, in 1971. Petition, 5a-6a. Then the court ordered that the "prior conviction must be striken from the indictment" because petitioner "may" have ineffectively waived counsel. When petitioner's third trial ended in a hung jury, the prosecutor determined not to proceed further against petitioner.

Because under state law the order striking the prior from the indictment had no significance apart from the proceeding in which it was entered, the prosecutor had no reason to appeal. Moreover, existing state decisional law held that by reason of the mistrial, the striking order was unappealable. People v. Bryan, 3 Cal.App.3d 327, 339, 83 Cal.Rptr. 291, 299 (1970). Had such an appeal been pursued, petitioner with good reason could have claimed harassment by an unsuccessful prosecutor insisting that an appellate court resolve a by-then moot

question.

Petitioner now contends that the county prosecutor was forced to appeal or to bind the state forever for all purposes by the trial court's ruling on his motion to strike. The absurdity of this suggestion is evident considering that a principal purpose of the collateral estoppel doctrine is judicial economy. Standefer v. United States, 100 S.Ct. 1999, 2006-2007 (1980). California appellate courts have more urgent business than deciding whether trial courts have correctly striken priors from discontinued prosecutions.[4/] Worse, the principal goal of the res judicata doctrine, to spare parties unnecessary litigation, would be frustrated.

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4. The substantial impact in state courts of petitioner's proposed constitutional rule is reflected in statistics regarding invalidated priors supplied in People v. Davis, 94 Cal.App.3d 215, 220 n. 1, 156 Cal.Rptr. 395, 399 n. 1 (1979).

An essential element of the res judicata or collateral estoppel doctrine is identity of issues. Hight v. Hight, 67 Cal.App.3d 498, 136 Cal.Rptr. 685 (1977). Underlying this requirement is an equal dignities motion: conclusive effect should not be given a judgment where the incentive to litigate the issue was substantially less than in the present proceeding. It is unfair to attach consequences to a judgment far exceeding those foreseen by the litigants at the time. A prosecutor who in 1967 alleges a prior conviction for sentence enhancement purposes has much less reason to challenge a striking order than does the prosecutor who in 1977 seeks to prove the stricken prior as an element of the charged offense. Certainly, neither petitioner nor the state had reason to believe in 1971 that Judge Cook's order, contrary to two earlier rulings, would be res judicata. Indeed, petitioner did not

think that as late as August 16, 1978, when in unequivocal terms defense counsel disavowed reliance on the res judicata doctrine.

The federal Constitution does not so far intrude into the administration of state courts as to dictate what subsequent effect must be given to orders striking prior convictions from accusatory pleadings.

III

PETITIONER'S CONVICTION DOES NOT REST UPON THE RETROACTIVE APPLICATION OF DECISIONS OF THIS COURT

United States Constitution, Article I, section 10, forbids state legislatures from enacting ex post facto laws, which retroactively enlarge criminal liability or increase punishment. "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the

same result by judicial construction." Bouie v. City of Columbia, 378 U.S. 347, 353-354 (1964). Petitioner contends that his conviction rests upon the state courts' retroactive application of this Court's decisions in Faretta v. California, 422 U.S. 806 (1975) and Lewis v. United States, 100 S.Ct. 915 (1980). The claim is unabashed nonsense.

Lewis held that 18 U.S.C. App. § 1202(a)(1) "prohibits a felon from possession a firearm despite the fact that predicate felony may be subject to the collateral attack on constitutional grounds." 100 S.Ct. at 921. Petitioner states that in reaching the same conclusion under California Penal Code section 12021, "it is apparent from the face of the District Court of Appeal decision that it simply abandoned applicable California state law in light of Lewis." Petition, 13. This misrepresentation insults even the casual reader of the opinion below.

Instead of following Lewis, the Court of Appeal adhered to its own decision, rendered in 1965 in People v. Loomis, 231 Cal.App.2d 594, 597, 47 Cal.Rptr. 124, 126 (1965). The Court of Appeal held as follows:

> "Under appellant's argument Judge Pulich was bound to find the 1964 conviction constitutionally invalid because of the earlier rulings of Judges Cook and Kelsay. However, this argument presupposes that a defendant charged with a violation of Penal Code section 12021 may raise as a defense the validity of the underlying prior felony conviction. A defendant may not raise such a defense. 'Appellant's status at the time he possessed the gun is the critical issue.' (People v. Loomis (1965) 231 Cal.App.2d 594, 597; see also Lewis v. United States

(1980) ____ U.S. ____, 63 L.Ed.2d 198, 100 S.Ct. 915.)" Petition, 7a. "Appellant's status at the time he possessed the gun is the critical issue," is language from Loomis, not Lewis. Indeed, regarding Lewis the State argued

> "The intent of Congress tells little about the intent of our Legislature in enacting Penal Code section 12021. No further guidance on that subject is required, however, than is provided by this Court's opinion in People v. Loomis . . . ." Respondent's letter of May 1, 1980, p. 3.

The California Court of Appeal's interpretation of Penal Code section 12021 moots petitioner's claim that his prior conviction was preserved as an element of his present offense only by the impermissible retroactive application of Faretta. As the

Court of Appeal explained:

> "Appellant also contends before this court that his 1964 conviction is constitutionally invalid. But it is unnecessary for this court to address this issue because as noted above the invalidity of the prior may not be attacked after the possession has occurred." Petition, 8a.

Some think Faretta must be applied retroactively, People v. Holcomb, 235 N.W.2d 343, 347 n. 7 (Mich. 1975); others think differently, People v. McDaniel, 16 Cal.3d 156, 168, 127 Cal.Rptr. 467, 474 (1976). Appellant's conviction does hinge upon the answer to this question, however. Further, ex post facto and due process concepts are not offended by application of a decision recognizing the very right petitioner insisted upon in 1964. Faretta did not expand criminal liability or aggravate punishment.

CONCLUSION

For the stated reasons the People of the State of California respectfully urge this Court to deny the petition for writ of certiorari.

Dated: February 27, 1981.

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